

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed:
May 26, 2005

Grendel

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re L. Perrigo Company

Serial No. 75981699

H.W. Reick of Price, Heneveld, Cooper, DeWitt & Litton for
L. Perrigo Company.

Laura Gorman Kovalsky, Trademark Examining Attorney, Law
Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Bucher, Grendel and Holtzman, Administrative
Trademark Judges.


Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark GOOD SENSE (in standard character form) for
goods identified in the application as "thermometers for
medical purposes" in Class 10.¹

¹ Serial No. 75951699, filed on September 21, 2000 on the basis
of intent-to-use under 15 U.S.C. §1051(b). Applicant
subsequently filed an Amendment to Allege Use in which October

The Trademark Examining Attorney has issued a final refusal to register applicant's mark on the ground that the mark, as applied to the goods identified in the application, so resembles the mark A GOOD SENSE OF HEALTH,² registered as depicted below in special form

A Good Sense of Health



for various goods including "thermometers for medical purposes" in Class 10, as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d). Applicant has appealed the final refusal.

The evidence of record consists of the file of applicant's involved application; copies of applicant's previously-issued Registration Nos. 1763914 and 2549505, which are of the mark GOOD SENSE (in standard character form) for various goods in Classes 3 and 5 (Registration No. 1763914), and for various goods in Classes 3, 5, 8, 21 and 25 (Registration No. 2549505); and copies of the

2000 was alleged as the date of first use of the mark and the date of first use of the mark in commerce.

² Registration No. 2640099, issued on October 22, 2002.

specimens from the file of Registration No. 2640099, the registration cited by the Trademark Examining Attorney.

Applicant and the Trademark Examining Attorney have filed main appeal briefs. Applicant did not file a reply brief, and did not request an oral hearing.

Before we turn to the likelihood of confusion issue presented in this appeal, we will address the other arguments made by applicant in its brief. Applicant argues that, judging from the specimens of use contained in the file of the cited registration and made of record by applicant, the registrant does not make technical trademark use of the registered mark, i.e., on the thermometers or their packaging, but uses it only as an advertising tagline applied to advertisements for the thermometers. Even though applicant attempts to couch this argument in "likelihood of confusion" terms (by saying that there is no likelihood of confusion because applicant uses its mark as a proper trademark on the goods while registrant uses its mark only as a tagline on advertising materials), it is clear that the argument, however couched, constitutes an impermissible collateral attack on the validity of the cited registration which will not be entertained in this ex parte proceeding. See *In re Dixie Restaurants*, 105 F.3d

1405, 41 USPQ2d 1531 (Fed. Cir. 1997). See also TMEP §1207.01(d)(iv) and the other cases cited therein.

Equally unavailing to applicant in this proceeding are its arguments (a) that purchasers will not be confused because they will recognize applicant's GOOD SENSE mark as a house mark which applicant uses on a variety of other personal care and health products; (b) that although applicant commenced use of its GOOD SENSE mark on thermometers subsequent to registrant's commencement of use of registrant's mark, applicant commenced use of its GOOD SENSE mark on a variety of other, related, products prior to registrant's use, that thermometers are within applicant's natural zone of expansion for such products, and that applicant therefore has priority as to such products, as well as thermometers; and (c) that applicant is unaware of any instances of actual confusion having occurred.

Applicant's alleged use of GOOD SENSE as a house mark on products other than thermometers is irrelevant to the narrow likelihood of confusion issue presented in this appeal, i.e., whether applicant's mark, as applied to the "thermometers for medical purposes" identified in the application, so resembles the cited registered mark, as applied to identical goods, as to be likely to cause

confusion. Likewise irrelevant in this proceeding is applicant's alleged priority of use of its mark on goods other than thermometers; priority is not an issue in an ex parte appeal. Finally, it is not dispositive that applicant is unaware of any instances of actual confusion. The issue here is likelihood of confusion, not actual confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990), and cases cited therein.

Turning now to that issue, we note that our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to the goods at issue, we find that applicant's goods, as identified in the application, are literally and legally identical to the pertinent goods as

identified in the cited registration, i.e., "thermometers for medical purposes." Moreover, because there are no restrictions or limitations in the identification of goods in either applicant's application or the cited registration, we presume that applicant's and registrant's legally identical goods are marketed in the same trade channels and to the same classes of purchasers.

We turn next to the first *du Pont* factor, i.e., whether applicant's mark, GOOD SENSE, and the cited registered mark, A GOOD SENSE OF HEALTH and design, are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. We make this determination in accordance with the following principles.

The test under the first *du Pont* factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although

the marks at issue must be considered in their entirety, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Finally, in cases such as this, where the applicant's goods are identical to the goods identified in the cited registration, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

First, we find that the dominant feature in the commercial impression created by the cited registered mark is the wording in the mark, i.e., A GOOD SENSE OF HEALTH. The stylization of the lettering and the design element in the registered mark are truly de minimis, and they contribute little or nothing to the commercial impression of the mark. Thus, in comparing applicant's mark and the cited registered mark, we shall give more weight to the wording in the registered mark. *See In re National Data Corp.*, *supra*.

In terms of appearance and sound, we find that the marks are similar to the extent that both marks include the words GOOD SENSE. The words "a" and "of health" in the cited registered mark are not present in applicant's mark, and the marks are dissimilar to that extent. The design feature in the registered mark is de minimis and does not distinguish the marks. In terms of connotation and overall commercial impression, we find that the marks are more similar than dissimilar because they both prominently feature the words GOOD SENSE. It is true that, in the cited registered mark, the words GOOD SENSE appear as part of the phrase A GOOD SENSE OF HEALTH, and they may have a slightly different connotation as a result. However, purchasers familiar with the mark A GOOD SENSE OF HEALTH as applied to thermometers, who nonetheless would retain but an imperfect recollection of that mark, are likely to be confused upon encountering the identical goods bearing a mark also containing the words GOOD SENSE.

Again, because applicant's goods are identical to the goods in the cited registration, the degree of similarity between the marks which is required to support a finding of likelihood of confusion necessarily is lesser than it would be if the goods were dissimilar. We find that applicant's mark is sufficiently similar to the cited registered mark

that confusion is likely to occur when the marks are contemporaneously used on identical products. Any doubt which might exist as to this conclusion must be resolved against applicant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register is affirmed.